

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FELIX LAVELL WASHINGTON,

Petitioner,

Case No. 1:18-cv-206

v.

Honorable Janet T. Neff

TONY TRIERWEILER,

Respondent.

OPINION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether “it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4, RULES GOVERNING § 2254 CASES; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). After undertaking the review required by Rule 4, the Court concludes that the petition must be dismissed because it fails to raise a meritorious federal claim.

Discussion

I. Factual allegations

Petitioner Felix Lavell Washington is incarcerated with the Michigan Department of Corrections at the Bellamy Creek Correctional Facility (IBC) in Ionia, Michigan. On November 10, 2014, a Oakland County Circuit Court judge took Petitioner's plea of *nolo contendere* to charges of assault with intent to do great bodily harm, Mich. Comp. Laws § 750.84, felon in possession of a firearm, Mich. Comp. Laws § 750.224f, and two counts of felony firearm, Mich. Comp. Laws § 750.227b. On December 15, 2014, the court sentenced Petitioner as a habitual offender-third offense, Mich. Comp. Laws § 769.11, to terms of imprisonment as follows: 7 years, 1 month to 20 years for assault concurrent to 3 years, 7 months to 10 years for felon in possession of a firearm. Those sentences are to be served consecutively to concurrent sentences of 2 years on each felony firearm count.

Petitioner filed a post-judgment motion to withdraw his plea. After the motion, as amended, was denied, he filed an application for leave to appeal in the Michigan Court of Appeals raising the same issues he raises in this habeas petition. By order entered November 30, 2016, the court of appeals denied Petitioner's application "for lack of merit in the grounds presented." (Mich. Ct. App. Order, ECF No. 1-1, PageID.18.) Petitioner then filed an application for leave to appeal the court of appeals' denial in the Michigan Supreme Court. By order entered June 21, 2017, that court remanded the case to the Oakland County Circuit Court for a determination regarding the trial court's inclination to impose a different sentence, armed with the knowledge that the sentencing guidelines are discretionary instead of mandatory under *People v. Lockridge*. (Mich. Order, ECF No. 1-1, PageID.17.) In all other respects, the Michigan Supreme Court declined to consider the issues raised by Petitioner. (*Id.*)

On February 27, 2018, Petitioner timely filed his habeas corpus petition. The petition raises 2 grounds for relief, paraphrased as follows:

- I. Petitioner was deprived of his Fifth and Fourteenth Amendment rights when Offense Variable 3 was improperly scored.
- II. Petitioner was deprived of his Fifth, Sixth, and Fourteenth Amendment rights when his trial counsel failed to employ an expert to demonstrate that the injuries to the victim did not fall within Offense Variable 3.

(Pet., ECF No.1, PageID.5, 9.)

II. AEDPA Standard

This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA). The AEDPA “prevents federal habeas ‘retrials’” and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d). This standard is “intentionally difficult to meet.” *Woods v. Donald*, 575 U.S. ___, 135 S. Ct. 1372, 1376 (2015) (internal quotation omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the “clearly established” holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Lopez v. Smith*, 135

S. Ct. 1, 3 (2014); *Bailey*, 271 F.3d at 655. Moreover, “clearly established Federal law” does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 565 U.S. 34 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 565 U.S. at 38).

A federal habeas court may issue the writ under the “contrary to” clause if the state court applies a rule different from the governing law set forth in the Supreme Court’s cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405-06). “To satisfy this high bar, a habeas petitioner is required to ‘show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’” *Woods*, 135 S. Ct at 1376 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). In other words, “[w]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner’s claims.” *White v. Woodall*, 572 U.S. ___, 134 S. Ct. 1697, 1705 (2014) (internal quotations omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003); *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state

appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

III. Guidelines Scoring

Petitioner has not provided much factual background regarding the offenses of which he was convicted. Because Petitioner entered a *nolo contendere* plea, he did not have an appeal as of right, so the orders from the Michigan appellate courts are not particularly enlightening. The petition and the appeal brief Petitioner incorporates by reference reveal the following:

- A. The trial court reviewed the July 29, 2014, preliminary examination transcript to establish the plea foundation. (Appellant's Br., ECF No. 1-1, PageID.26.)
- B. The victim, Reginald Ellis, testified that he was shot below his right eye. As a result Ellis was barely able to see through the eye. Mr. Ellis heard the injury would be permanent. (*Id.*, PageID.27.)
- C. The defense acknowledged that Ellis had vision problems. (*Id.*)
- D. The trial court stated that the victim was shot in the face, the injury was life threatening, and the damage to the victim's eye was more than "momentary blurring." (*Id.*, PageID.28-29.)

Against that backdrop, the trial court scored offense variable 3 regarding the extent of injury to the victim.

The Michigan sentencing guideline statute provides:

Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- | | | |
|-----|--|------------------|
| (a) | A victim was killed | 100 points . . . |
| (c) | Life threatening or permanent incapacitating injury occurred to a victim | 25 points |
| (d) | Bodily injury requiring medical treatment | |

	occurred to a victim	10 points
(e)	Bodily injury not requiring medical treatment occurred to a victim	5 points
(f)	No physical injury occurred to a victim	0 points

Mich. Comp. Laws § 777.33(1). The trial court scored 25 points on offense variable 3. Petitioner contends the court should have scored 10 points. Petitioner does not contend that the trial court relied on any false facts in scoring the guidelines; rather, Petitioner argues that the court’s conclusions that the victim’s injuries were life threatening or permanently incapacitating were wrong in light of the facts before the court. (Appellant’s Br., ECF No. 1-1, PageID.28-29.) Petitioner specifically argues that the trial court misapprehended the applicable law. (*Id.*, PageID.30.) Alternatively, Petitioner argues that the trial court’s factual determinations are unreasonable on the record. (*Id.*, PageID.32.)

“[A] federal court may issue the writ to a state prisoner ‘only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.’” *Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010) (quoting 28 U.S.C. § 2254(a)). A habeas petition must “state facts that point to a ‘real possibility of constitutional error.’” *Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977) (quoting Advisory Committee Notes on Rule 4, Rules Governing Habeas Corpus Cases). The federal courts have no power to intervene on the basis of a perceived error of state law. *Wilson*, 131 S. Ct. at 14; *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 67-68 (1991); *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

Claims concerning the improper application of sentencing guidelines are state-law claims and typically are not cognizable in habeas corpus proceedings. *See Hutto v. Davis*, 454 U.S. 370, 373-74 (1982) (federal courts normally do not review a sentence for a term of years that falls within the limits prescribed by the state legislature); *Austin v. Jackson*, 213 F.3d 298, 301-02

(6th Cir. 2000) (alleged violation of state law with respect to sentencing is not subject to federal habeas relief). Michigan’s definitions of “life threatening injury” or “permanent incapacitating injury” under the sentencing guidelines are, therefore, purely state law issues.

The decision of the state courts on a state-law issue is binding on a federal court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983). “[A] state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.” *Stumpf v. Robinson*, 722 F.3d 739, 746 n.6 (6th Cir. 2013) (quoting *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005)). Thus, the Michigan Court of Appeals’ determination that Petitioner’s challenge to the trial court’s scoring of offense variable 3 has no merit conclusively resolves the issue.

Even if the scoring is correct under state law, there may be due process implications if it is based upon material “misinformation of constitutional magnitude.” *Roberts v. United States*, 445 U.S. 552, 556 (1980), *quoted in Koras v. Robinson*, 123 F. App’x 207, 213 (6th Cir. 2005); *see also United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948). To prevail on such a claim, the petitioner must show (1) that the information before the sentencing court was materially false, and (2) that the court relied on the false information in imposing the sentence. *Tucker*, 404 U.S. at 447; *United States v. Polselli*, 747 F.2d 356, 358 (6th Cir. 1984); *Koras*, 123 F. App’x at 213 (quoting *United States v. Stevens*, 851 F.2d 140, 143 (6th Cir. 1988)). A sentencing court demonstrates actual reliance on misinformation when the court gives “explicit attention” to it, “found[s]” its sentence “at least in part” on it, or gives “specific consideration” to the information before imposing sentence. *Tucker*, 404 U.S. at 444, 447.

Petitioner does not identify any facts relied upon by the court at sentencing that were either materially false or based on false information. He therefore fails to demonstrate that

assistance.” *Strickland*, 466 U.S. at 690. Even if a court determines that counsel’s performance was outside that range, the defendant is not entitled to relief if counsel’s error had no effect on the judgment. *Id.* at 691.

Moreover, as the Supreme Court repeatedly has recognized, when a federal court reviews a state court’s application of *Strickland* under § 2254(d), the deferential standard of *Strickland* is “doubly” deferential. *Harrington*, 562 U.S. at 105 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)); *see also Burt v. Titlow*, 134 S. Ct. 10, 13 (2013); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011); *Premo v. Moore*, 562 U.S. 115, 122 (2011). In those circumstances, the question before the habeas court is “whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.*; *Jackson v. Houk*, 687 F.3d 723, 740-41 (6th Cir. 2012) (stating that the “Supreme Court has recently again underlined the difficulty of prevailing on a *Strickland* claim in the context of habeas and AEDPA”) (citing *Harrington*, 562 U.S. at 102).

Here, even if it were unreasonable for counsel to fail to call an expert, Petitioner has failed to show any resulting prejudice. “A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim.” *United States v. Ashimi*, 932 F.2d 643, 650 (6th Cir. 1991) (footnote omitted).¹ Though a

¹ *See also Pillette v. Berghuis*, 408 F. App’x 873, 887 (6th Cir. 2010) (“The salient point is that nobody knows what she would have said. Speculation cannot suffice to establish the requisite prejudice.”); *Neverson v. Farquharson*, 366 F.3d 32, 45 (1st Cir. 2004) (“[H]e has not offered any evidence of what that person would have said, let alone shown that the lack of such testimony materially prejudiced his defense.”); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3rd Cir. 1991) (“Zettlemoyer cannot meet his burden . . . based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense.”); *Goins v. Warden, Perry Corr. Inst.*, 576 F. App’x 167, 173 (4th Cir. 2014) (“[Petitioner’s] failure to [show] what an expert witness would have testified regarding the mental health evidence . . . reduces any claim of prejudice to mere speculation and is fatal to his claim.”); *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) (“[T]o prevail on an ineffective assistance claim based on counsel’s failure to call a witness, the petitioner must . . . set out the content of the witness’s proposed testimony, and show that the testimony would have been favorable to a particular defense.”); *Patel v. United States*, 19 F.3d 1231, 1237 (7th Cir. 1994) (“Where a petitioner claims his trial counsel failed to call a witness, he must make a specific, affirmative showing as to what the missing evidence would have been, and prove that this witness’s testimony would have produced a different result.”) (internal citations omitted); *United States v. Vazquez-Garcia*, 211 F. App’x 544, 546

gunshot to the face may not be *per se* life threatening, it might be difficult to find a medical expert to testify that the gunshot to Mr. Ellis's face was not life threatening or that the damage to his vision was not permanently incapacitating. Here, Petitioner offers only his self-serving estimation that such testimony could have been presented. That is not sufficient to demonstrate the requisite prejudice. Accordingly, Petitioner has failed to demonstrate that the state appellate court's rejection of his claim is contrary to, or an unreasonable application of, *Strickland*, the clearly established federal law regarding ineffective assistance of counsel.

Conclusion

In light of the foregoing, the Court will summarily dismiss Petitioner's application pursuant to Rule 4 because it fails to raise a meritorious federal claim.

Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court's dismissal of Petitioner's action under Rule 4 of the Rules Governing § 2254 Cases is a determination that the habeas action, on its face, lacks sufficient merit to warrant service. It would be highly unlikely for this Court to grant a certificate, thus indicating to the Sixth Circuit Court of Appeals that an issue merits review, when the Court has already determined that the action is so lacking in merit that service is not warranted. *See Love v. Butler*, 952 F.2d 10 (1st Cir. 1991) (it

(8th Cir. 2007) ("Recognizing the deferential standard when reviewing the conduct of counsel, we decline to find prejudice in this situation when there is no evidence other than speculation to support the finding."); *Smith v. Adams*, 506 F. App'x 561, 565 (9th Cir. 2013) ("Smith merely speculates as to the expert testimony that could have been produced, but '[s]peculation about what an expert could have said is not enough to establish prejudice."); *Sullivan v. DeLoach*, 459 F.3d 1097, 1109 (11th Cir. 2006) ("This prejudice burden is heavy where the petitioner alleges ineffective assistance in failing to call a witness because 'often allegations of what a witness would have testified to are largely speculative.'").

is “somewhat anomalous” for the court to summarily dismiss under Rule 4 and grant a certificate); *Hendricks v. Vasquez*, 908 F.2d 490 (9th Cir. 1990) (requiring reversal where court summarily dismissed under Rule 4 but granted certificate); *Dory v. Comm’r of Corr. of New York*, 865 F.2d 44, 46 (2d Cir. 1989) (it was “intrinsically contradictory” to grant a certificate when habeas action does not warrant service under Rule 4); *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983) (issuing certificate would be inconsistent with a summary dismissal).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must “engage in a reasoned assessment of each claim” to determine whether a certificate is warranted. *Id.* at 467. Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Petitioner’s claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* “A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner’s claims. *Id.*

The Court finds that reasonable jurists could not conclude that this Court’s dismissal of Petitioner’s claims was debatable or wrong. Therefore, the Court will deny Petitioner a certificate of appealability.

A Judgment and Order consistent with this Opinion will be entered.

Dated: March 28, 2018

/s/ Janet T. Neff
Janet T. Neff
United States District Judge